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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 757

FREDDIE JOE WELCH and PAUL L. TUGWELL,

Petitioners,

v.

GERALD B. LEAVEY, Deputy Commissioner, ET AL,

Respondents.

REPLY BRIEF OF PETITIONERS FREDDIE JOE WELCH AND PAUL L. TUGWELL TO THE BRIEFS OF RESPONDENTS THE DEPUTY COMMISSIONER AND THE EMPLOYERS AND INSURANCE CARRIER

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REPLY BRIEF OF PETITIONERS FREDDIE JOE WELCH AND PAUL L. TUGWELL

STATEMENT

If the Deputy Commissioner and the employers and insurance carrier correctly stated the questions presented, then this Petition would not have been filed, nor would the proceedings in the district court as well as those in the Fifth Circuit Court of

Appeals been pursued because the cases would have been controlled by the cases cited by Respondent Deputy Commissioner.[1] But this Petition invokes questions properly reviewable by the courts under 33 U.S.C.921(b) printed in Appendix A, page 1a, of this Reply Brief as interpreted by this Court in Norton v. Warner Co., 321 U.S. 565, 569; 64 S.Ct. 747, 750.[2]

REPLY TO RESPONDENTS

The flaw in the arguments of the Deputy Commissioner, the employers, and the insurance carrier is that such

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1 O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359; Voehl v. Indemnity Insurance Co., 288 U.S. 162; Del Vecchio v. Bowers, 296 U.S. 280; Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469; O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504; see, also, Owens v. Traynor, 396 F.2d 783 (C.A. 4), certiorari denied, November 25, 1968, No. 529.

2 "Thus it is that the judicial review conferred by § 21 (b) does not give authority to the courts to set aside awards because they are deemed to be against the weight of the evidence. More is required. The error must be one of law, such as the misconstruction of a term of the Act."

arguments fail to take into consideration the Legislative History, pages 38a-47a, particularly pages 44a-46a and cases there cited, in Appendix G of Petitioners' Petition adding the amendment (§ h). The awards seem to have been issued under 33 U.S.C. 908 (21) without regard to the amendment (§ h), and Respondents seek to uphold them under the statute as it existed prior to amendment. These arguments were held to be untenable over thirty (30) years ago by the Court of Appeals for the District of Columbia in Hartford Accident & Indemnity Company v. Hoage, District of Columbia circuit, 85 F.2d 420, and this case was used as an example by the Department of Labor in requesting Congress to amend the statute where the Court of Appeals for the District of Columbia quoted with approval Postal Telegraph Cable Company v. Industrial Accident Commission of California, 3 Pac.2d 6, cited also in the Legislative History:

> "...The right to compensation is not lost or diminished by the injured employee's return to work at the same or a different wage than that theretofore earned by him." (See page 85)

A review of the cases cited in the Legislative History seems to indicate an intention on the part of Congress that the injured employee is to be awarded compensation when he is permanently and partially disabled to his

body as a whole as a result of injury without regard to earnings, the same as the injured employee is to be awarded compensation when he has sustained a disability to a specific member of his body covered under 33 U.S.C. 908(c) 1-19, pages 26a through 29a, of Appendix D of the Petition.

Any other construction seems to place an unrealistic approach on the intent of Congress to compensate the injured employee for injuries to the body as a whole as distinguished from compensation to be awarded for injuries to specific members of the body and for disfigurement. It is difficult for the undersigned to visualize Congress on one hand allowing compensation for permanent partial incapacity for an injury to a specific member of the injured employee's body, resulting in no loss of earnings and at the same time not to require compensation be paid for an injury to the body generally for permanent partial disability, especially in view of the Legislative History, supra.

While there is a view of Ennis v. O'Hearne, 223 F.2d 755, Fourth Circuit, which might be construed as involving only the substantial evidence rule, consideration of background of the case of necessity shows that it stands for the proposition that where the injured employee has sustained some permanent partial disability, he is to be awarded compensation, otherwise the case should have been affirmed under the substantial

evidence rule referred to, supra. (There was testimony showing he had no more than ten per cent [10%] disability to the body as a whole. Petitioner Welch has been determined to have five per cent [5%] to ten per cent [10%], and Petitioner Tugwell, twenty per cent [20%].)

In Travelers Insurance Company v. McClellan, 288 F.2d 250, cited by Petitioners, upon further reflection it is conceded not to be a conflicting decision by another circuit because the Deputy Commissioner made findings of fact as to the fact that the injured employee's actual earnings did not fairly represent his wage earning capacity. (In this case, no findings are made as to whether the wages earned fairly represented Petitioners' wage earning capacity, and attention is called to the findings in Travelers, supra, pertaining to basic pay wages on the job, general increases of the industry, etc., all present in practically every case today because of improvements in technology, inflation, et cetera.)

Petitioners contend, at the very least, the Deputy Commissioner was required to find whether or not the wages subsequent to date of injury fairly and reasonably represented the injured employees' wage earning capacity. In Petitioners' case, the Fifth Circuit has effectively ruled that such findings are not required to be made specifically but that they may be made inferentially.

Not only is this contrary to Automatic Canteen Company v. Federal Trade Commission, 73 S.Ct. 1017, 1028; 346 U.S. 61, 81, cited on pages 6 and 9 of Petitioners' Petition, but the difficulty with this view of the law is that it is impossible for anyone to actually determine whether or not the Deputy Commissioner was proceeding on a correct view of the law because his findings are not definite enough for the courts to say whether or not he considered Petitioners' wages after injury definitely to fairly and reasonably represent their capacity to work and earn money.

CONCLUSION

Therefore, since the Legislative History indicates an intention on the part of Congress to award compensation for injuries to the body generally, in line with compensation allowed for injuries resulting in disability to specific members of the body as well as disfigurement, and further indicates a rejection of Respondents' positions, and in any event requires a finding under the facts of these cases as to whether or not the earnings of Petitioners fairly and reasonably represent their respective abilities to work and earn money as compared to their ability previous to injury to work and earn money; since the rulings below are in conflict of necessity with Ennis v. O'Hearne, supra and page 6 of Petition; since the

findings by the Deputy Commissioner are not adequate as judged by Automatic Canteen Company, supra; and since this represents an important question of federal law probably decided differently from how this Court would decide same, Petitioners pray that the Petition be granted and the Court issue appropriate instructions to the courts and Deputy Commissioner below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of the foregoing Reply Brief have been served upon each of the following: Solicitor General, Department of Justice, Washington, D. C. 20530, and upon Mr. Charles Donahue, Solicitor of Labor, Washington, D. C., 20530, each by depositing two (2) copies thereof in a United States Post Office or mailbox addressed to their Post Office address, Airmail, postage prepaid, and upon Mr. Morton Sussman, United States

Attorney, 515 Rusk Avenue, Houston, Texas 77002, counsel for Respondent, Gerald B. Leavey, Deputy Commissioner; Royston, Rayzor & Cook, 877 San Jacinto Building, Houston, Texas 77002, counsel for Respondents Texas Employers' Insurance Association and Atlantic & Gulf Stevedores, Inc., and Young & Company of Houston, by depositing in a United States Post Office or mailbox the same to each of them, United States Mail, postage prepaid, properly addressed to each of them at their respective Post Office addresses, this the 30th day of December, 1968.

(Original Signed) W. JILES ROBERTS

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APPENDIX A

33 U.S.C. 921 Review of compensation orders

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injuction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay, shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.